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No. 02-236

Supreme Court, U.S.
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In The

Supreme Court of the United States

YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, and MICHAEL ANTONOVICH,

Petitioners,

v.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

Pursuant to Supreme Court Rule 15.8, Petitioners Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky and Michael Antonovich hereby submit this supplemental brief to address Respondent Javier Rocha's recent dismissal of this case in the district court.

On July 18, 2002, counsel for Respondent advised Petitioners' counsel that he would dismiss Petitioners from this case. Petitioners' counsel prepared a stipulation of dismissal, executed it on that very same day, and personally delivered it to the offices of Respondent's counsel. Petitioners' counsel followed up with a letter and a telephone call to Respondent's counsel to inquire about the status of the dismissal. No response was ever received.

This petition for *writ of certiorari* was then filed on August 13, 2002. Respondent's counsel received his service copy of the petition on August 15, 2002. On August 16, 2002, the next day, Respondent filed the dismissal in the district court. *See* App. at 1-2.

Respondent manipulatively dismissed the case below in an effort to preclude this Court from considering the petition, contrary to established law. *See, e.g., Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-662, 113 S.Ct. 2297 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070 (1982). If Respondent's tactical dismissal is allowed to moot the petition, justice will be undermined and frustrated.

Respondent's counsel boasts that he has sued Petitioners, and promises to keep suing Petitioners, based upon the same claim raised here, namely, that Petitioners

are personally liable because of their alleged votes to indemnify punitive damage awards imposed against Sheriff's deputies. True to his word, counsel has raised this claim in at least thirteen other lawsuits against Petitioners. The Ninth Circuit's errant precedent was the basis for denying absolute immunity in all of these cases. Most of these cases also delayed adjudicating qualified immunity, resulting in costly and harassing discovery.

Absolute and/or qualified immunity should have been applied in all these cases. Instead, three are still pending. Further, Respondent's counsel has filed, but not yet served, at least three more identical suits against Petitioners. Respondent's counsel also has promised to keep suing Petitioners "in every single case" he files in the future. *See* App. at 17:8-9.

ARGUMENT

In *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379 (1979), this Court stated that the burden of establishing mootness "is a heavy one." The Court also stated that the voluntary termination of the underlying dispute does not render the matter moot if there is a "reasonable expectation" that it will recur in the future. *Id.*; *see United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897 (1953) (if voluntary cessation rendered a case moot, "the courts would be compelled to leave the defendant . . . free to return to his old ways") (internal citations omitted).

In the *City of Mesquite* decision, a city ordinance prohibited an owner of a coin-operated amusement center who had "connections with criminal elements" from

obtaining a business license. *City of Mesquite*, 455 U.S. at 288. The petitioner was denied a license on this ground and sued, claiming that the "criminal elements" restriction was impermissibly vague. *Id.* at 287. In opposition, the city argued that the case was moot because the ordinance was amended to remove the "criminal element" restriction. *Id.* at 288. This Court rejected the mootness argument and decided the case on its merits:

> "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . In this case, the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment was vacated."

Id. at 289.

Similarly, in *City of Jacksonville*, the petitioner challenged an ordinance requiring that a certain percentage of city contracts be awarded to minority owned businesses. *City of Jacksonville*, 508 U.S. at 658-59. The city repealed the underlying ordinance and replaced it with a slightly different one twenty-two days after this Court granted *certiorari*. *Id.* at 660. The city then moved in this Court to dismiss the appeal as moot. *Id.* at 660. Relying on *City of Mesquite*, the Court denied the motion. *Id.* at 662.

The same result should obtain here. Three of the other thirteen section 1983 suits[1] brought against Petitioners by

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[1] *Bell v. Baca*, 01-CV-02067; *Benas v. Baca*, 00-CV-11507 (pending); *Berry v. Baca*, 01-CV-02069; *Casares v. Baca*, 99-CV-07817; *Chweya v. Baca*, 00-CV-07150 (pending); *Hart v. Baca*, 01-CV-01866; *Hawkins v.*

(Continued on following page)

Respondent's counsel are still pending: *Benas v. Baca*, 00-CV-11507; *Chweya v. Baca*, 00-CV-07150 (which has been stayed while the plaintiff appeals the district court's finding of no underlying constitutional violation); and *Moore v. Baca*, 01-CV-03552 (in which only plaintiffs' official capacity claims against Petitioners remain). Respondent's counsel also filed, but has not yet served, at least three more identical suits against Petitioners[3] and has promised to keep suing them in the future. *See* App. at 16-17:5-10.

Unless this Court intervenes, Petitioners will continue to be deprived of absolute and qualified immunity in both the present cases and the future ones which Respondent's counsel promises to bring. Respondent's dismissal is a transparent attempt to preclude this Court from bringing the Ninth Circuit in line with this Court's absolute and qualified immunity jurisprudence.

CONCLUSION

For the foregoing reasons, Petitioners assert that the issues raised in their petition for *writ of certiorari* are not rendered moot by way of Respondent's dismissal of this action in the district court below and request that this

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Baca, 00-CV-01078; *King v. Baca*, 00-CV-11178; *Moore v. Baca*, 01-CV-03552 (pending); *Moreno v. Baca*, 00-CV-07149; *Mortimer v. Baca*, 00-CV-13002; *L. Navarro v. Baca*, 99-CV-08888; and *R. Navarro v. Baca*, 98-CV-7434.

[3] *Green v. Baca*, 02-CV-04744; *Harris v. Baca*, 01-10905; and *Thomas v. Baca*, 01-CV-10903.

Court grant their petition to prevent the erosion of absolute and qualified immunity with respect to elected legislators.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Western Division

JAVIER ROCHA, Plaintiff, v. LEE BACA; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY; PETE SCHABARUM; DEANE DANA; MICHAEL ANTONOVICH; DAVID SAMEYAH; TWENTY UNKNOWN NAMED DEFENDANTS; all sued in their individual and official capacities; and COUNTY OF LOS ANGELES, sued only in its official capacity, Defendants.	) Case No.)) **STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE OF THE SUPERVISOR DEFENDANTS**)) [F.R.C.P. 41(a)(1)]

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Javier Rocha ("Plaintiff") and Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich (the "Supervisor Defendants") by and through their respective counsel, hereby stipulate to the dismissal with prejudice of the above-captioned action as to the Supervisor Defendants, with each party bearing their own costs.

Dated: July 18, 2002

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: /s/ Andrew Baum
ANDREW I. BAUM
Attorneys for Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich

Dated: July 10, 2002

YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD

By: /s/ Stephen Yagman
STEPHEN YAGMAN
Attorney for Plaintiff Javier Rocha

IT IS SO ORDERED.

Dated: August 19, 2002

/s/ A. Howard Matz
The Honorable A. Howard Matz
United States District Court Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

L.B. MOORE, Plaintiff, vs. LEROY BACA, ET AL., Defendants.	CASE NO: CV 01-3552-FMC(RCx) CIVIL Los Angeles, California Wednesday, January 23, 2002 (9:00 a.m.)

DISCOVERY MOTION(S)

BEFORE THE HONORABLE ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE

[2] APPEARANCES FOR:

Plaintiff:	STEPHEN YAGMAN, ESQ. Yagman Yagman & Reichmann 723 Ocean Front Walk Venice, CA 90291 310 452-3200
Defendants:	PAUL B. BEACH, ESQ. Franscell Strickland, et al. 225 S. Lake Avenue, Penthouse Suite Pasadena, CA 91101 626 304-7830 ANDREW BAUM, ESQ.
Court Recorder:	None
Courtroom Deputy:	Debra Taylor-Spears
Transcriber:	Pattie Walker Exceptional Reporting Services P.O. Box 61850 Houston, Texas 77208 713 670-7774

[3] **Los Angeles, California; Wednesday, January 23, 2002**

THE COURT: Good morning. Please be seated.

THE CLERK: Calling Civil Case Number 01-3552, *L. B. Moore versus Leroy Baca, et al.*

Counsel, please state your appearances.

MR. YAGMAN: Good morning, your Honor. Stephen Yagman for the Plaintiffs.

I apologize for being late. I had a very tiring day yesterday, and I – when I went home, I went to sleep. But I didn't notice that on my car dashboard it said, "Fuel very low." And I got on the Santa Monica Freeway this morning, and I got to about La Cienega and it said, "You're out of fuel." And I decided rather than take the chance of running out completely, I got off the freeway, got two or three gallons of gas, and got in my car and came back here. I've never done that before. And I'm sorry I was late.

THE COURT: It's a fascinating story except I thought Mr. Reichman was handling the discovery for the Plaintiffs.

MR. YAGMAN: Well, he's not. And I think there's a big misunderstanding with respect to that. That –

THE COURT: Okay. We should talk about that then, Mr. Yagman.

MR. YAGMAN: I'll address that right now. Mr. Reichman is not handling discovery. He is the lead discovery counsel.

[4] We could have picked anybody to be that: me, Mr. Reichmann, Katherine Bloomfield, or Marian Yagman. We

happened to select Mr. Reichmann. He's supposed to be in charge of all discovery, and he is.

And if that's going to create a problem – and I see that the Defense counsel have been moaning about that –

THE COURT: I'll have to look at my General Order and see if – if the lead counsel's the one who's supposed to show up at hearings. I, frankly, don't remember what the General Order said about that.

MR. YAGMAN: I remember what it says. And it says that the only duties of the lead discovery counsel are to be available at all times to modify, correct, or whatever – anything that any other attorneys do.

I didn't think that this Order and the way we decided to address it would cause a problem. But Defense counsel have attempted to use it to bang me over the head with Joe Reichman. And that's going to have to stop or else, I'll just become lead discovery counsel. And then they won't be able to do that anymore.

I don't think that either the Court or Defense counsel can decide how we handle the action on our side so long as what we –

THE COURT: No. But we can demand that people be available when they need them to be available. And we'll talk [5] about that some other time.

MR. YAGMAN: And Mr. Reichman has always been available.

THE COURT: And he has always been available and he's cooperative and he gives out his fax number and

all those things. And that makes things move much more smoothly.

MR. YAGMAN: Right. And that's why we did it. But using that to support an implication that I'm not cooperative or there's something wrong with not having a line dedicated to a fax is just bologna.

THE COURT: Well, I think there is something wrong with that. But we'll talk about that some other time.

MR. YAGMAN: Then I'm going to substitute –

THE COURT: I think it puts you –

MR. YAGMAN: – as lead discovery counsel for Mr. Reichman.

THE COURT: I'm not talking about –

MR. YAGMAN: And we'll put up – put pay to that.

THE COURT: – this case. I'm talking about other cases. For example, I think the fact that you don't get orders the day they're issued – when the Court can send them out like in a different matter than you and I are settling, Mr. Yagman – presents a problem. I think it's better if you get things promptly. So I think it's better if you do have a fax.

I'm not saying that goes to this particular case. I [6] think it's been very helpful to have Mr. Reichman as lead counsel.

MR. YAGMAN: And that's –

THE COURT: So –

MR. YAGMAN: – why we did that.

THE COURT: That's good. So let's not get in a tiff about that at this point. Let me look at my Order when I get a chance.

MR. YAGMAN: So long as nobody tries to hit me in the head with that because if they do, then that'll change and I'll be lead discovery counsel.

THE COURT: I haven't seen either of these guys jump up –

MR. YAGMAN: It's come –

THE COURT: – and hit you in the head.

MR. YAGMAN: You haven't seen the correspondence –

THE COURT: Okay.

MR. YAGMAN: – going back and forth. And Mr. Reichman said in the first instance. "Don't give all that to the Court, and don't tell the Court how Mr. Baum threatened Mr. Reichman."

THE COURT: Well, we're –

MR. YAGMAN: You know –

THE COURT: – not going to deal with personality issues at this point.

[7] Last time I saw Mr. Baum, I told him to be quiet and that I preferred dealing with someone else from his side. So I'm fair across the board on this.

MR. YAGMAN: Okay.

THE COURT: So have a seat, Mr. Yagman.

MR. YAGMAN: By the way, the reason I'm here is because Mr. Reichman had to go to San Francisco. Otherwise, he would be here with me.

THE COURT: Okay. And I can't find my General Order yet.

Let the Defendants make their appearances please.

MR. BEACH: Good morning, Your Honor. Paul Beach for Defendant Baca.

MR. BAUM: Good morning, your Honor. Andrew Baum for the Supervisor Defendants.

THE COURT: Okay. Good morning, gentlemen.

I told you I was a little distressed about the posture in which these issues were presented to me. This isn't the only case recently in which I've had discovery issues presented in which I felt was an advisory opinion posture. And I don't like doing that.

Did I miss something? Are there outstanding Orders setting the deposition dates that I just don't know about?

MR. YAGMAN: I think what you – what you might characterize as something that you've missed but which really [8] couldn't be called that is this: Mr. Reichman and I understood your Order about how depositions were to be done as to not require a Notice of Deposition, to require counsel to try to cooperate.

And rather than arbitrarily setting a date with a notice and causing the tumult or the stress or the adversariness that comes from that, that what we were supposed

to do was send out a letter and say, "We'd like to do this," try to get dates back. And then if everyone agreed, we would do it. But if they didn't, we'd bring it before the Court rather than structuring it so that it was kind of adversarily, "Here's the notice. Be there on this date."

We thought this is what you wanted us to do and get a ruling from the Court before the issue was forced by a deposition notice.

Had I had – or Mr. Reichman – had any idea that you wanted us to do it the other way, it's not very difficult to send out a deposition notice.

THE COURT: Okay. Then I am definitely going to have to look at my General Order again and –

MR. YAGMAN: It's right around the end of October the beginning of November.

THE COURT: Okay.

MR. YAGMAN: And the first Order was October 17th. And then, I think, the General Order was –

[9] THE COURT: Thank you. I –

MR. YAGMAN: – several days after that.

THE COURT: Thank you.

All right. It's Number 60 on the Docket Sheet.

MR. BAUM: If I may, your Honor.

THE COURT: yes.

MR. BAUM: I – my impression was the same as –

THE COURT: The same.

MR. BAUM: – represented by Plaintiff's counsel.

THE COURT: Well, then clearly, it must be my fault if all the parties understood it that way. And I'll take a look, and I'll correct my Order if that's the case. And this is, as I said, not the only case that's happened in. So perhaps that is my problem.

Having said that, I nevertheless addressed the Order because I realize that you could do a deposition notice at any time. And I realize there was an issue of significance between the parties.

My ruling is against the Plaintiffs. So I guess the best thing to do is –

Have you had a chance to read my ruling?

MR. YAGMAN: I have.

THE COURT: Then this is your opportunity to argue to me why I'm wrong, Mr. Yagman.

MR. YAGMAN: It's the hard way that interrogatory [10] answers often are the responses of counsel that are suggested to clients – because I do the same thing myself, and I think all attorneys do. We draft answers based on –

I don't think this is funny. I really don't. And if I'm going to have to deal with that sort of thing, I'm going to respond in kind. And I refer to Mr. Beach sitting there king of giggling.

Now –

THE COURT: Don't giggle, Mr. Beach.

MR. BEACH: I'm sorry if I said anything.

THE COURT: Go ahead, Mr. Yagman.

MR. YAGMAN: The way I respond to interrogatories for our client is: I review the file, I speak to the client, and then I draft answers. And I put them in my language because I look out for things that might go in answers that could be harmful.

All of the answers we prepare are truthful, but they're basically something that I or other lawyers in the firm draft. We then discuss them with the clients. And if everything is truthful and accurate, the client verifies it. I believe that other attorneys basically do it the same way, from having worked in other firms and been in other offices and having questioned defendants in cases about how their interrogatory answers were done. So what you're basically getting is an answer that has an awful lot of input from an [11] attorney with an interrogatory.

On the other hand, in a deposition where a client is more or less naked, as it were, as a client is on the witness stand in court, the client can't get any advice from the attorney as to how to answer. And frequently, I've had people on the witness stand during trial whom I've impeached regarding things that were set forth in their interrogatories.

Additionally, there's an additional problem with the Supervisors' Answers to Interrogatories in this case. The reason I want to depose them is to get to cross-examine them to see if I can shake them loose from those answers because I have some anecdotal information that I have not been able to completely track down yet, although I've put out a call to a number of other attorneys who, I think,

might have this information. That since November 1, 1996, there has been at least and there may have been more votes to do one of the following things:

Indemnify a deputy sheriff for punitive damages or bond an award of punitive damages on appeal or payout money from the county in the case in which there was an award of punitive damages.

I believe that that – one of those three phenomena occurred in April, 2000.

That's why I've been pursuing this issue so hard because I'm concerned that the Supervisors – if I get that [12] information – they will either have gotten out of the action on Summary Judgment because I haven't been able to get it yet because I don't have the name of the case in which, I think, it happened.

Or, if the case proceeds to trial and I try to use that information to impeach them, that they're going to say that they do thousands of things all the time and they don't remember everything that they do. They take thousands of votes.

And that's basically what I want to do. I want to try to probe this a little further with the kinds of questions that you can put and do it quickly and have people be forced to answer without conferring with their attorneys.

In short, I don't think I should be stuck with their interrogatory answers. In fact, I could say to anybody in any case – and it wouldn't fly – that they shouldn't be able to depose any of our clients because they should send out interrogatories and just be satisfied with the answers because they're truthful. Yet, our clients get deposed all

the time. I've never had a case where plaintiffs weren't deposed.

That brings us to the issue that makes these people different than my clients. They're high-ranking Government officials. I know that. They don't want to be deposed, I think, because they think it would demean them. I don't think it's because they don't have enough time to be deposed or they [13] would be pestered.

I've read the Court's Order very, very carefully, and I've looked at some of the words in the cases, many of which – most of which I've read because this isn't the first time this issue has come up. And for example, on Page 5 of the court's Tentative Ruling under Roman Numeral V, in quoting from the case of *Worzon versus Drew (phonetic* [sic], the Court quotes as follows:

> "Such officials must be allowed the freedom to perform their tasks without the "constant" – and I focus on the word "constant" – interference of the discovery process."

I've never, ever deposed any Supervisors. And I only seek to depose them on this issue. There are six or seven or eight or nine cases like this pending in all of which I represent the plaintiffs. And I haven't tried to depose them in other cases. I've decided to try to put this issue to rest one way or the other in this case.

And I haven's constantly deposed them. I don't want to constantly depose them. I want to get to depose them once so that face to face and without their having assistance of counsel in answering, I'm able to pepper them with questions to see if I can shake them loose from their

blanket answer that they have never done anything like this.

So the *Worzen* case doesn't really apply. I just want [14] one shot. And then –

THE COURT: So the *Worzen* case is just gravy.

In the *Kyle Engineering Company* case, although it's just a throw-away line by the Ninth Circuit, it's still good law. I mean, I checked it every which way you can. And after more than 20 years, it's still good law.

MR. YAGMAN: I know. But there's enough – there's a word in there. The word is "normally." And –

THE COURT: And in certain circumstances, clearly, they can be deposed. And it's your burden to show that these are the circumstances to depose them.

MR. YAGMAN: Clearly understood.

THE COURT: It's a higher burden. I just didn't think you made your burden.

MR. YAGMAN: I am trying to make it a little bit better now.

I – the *Kyle* case has been around for a very, very long time. And this issue is going to keep coming up in every case. And this deposition fight is going to be fought in every case. Eventually, I'll get to depose them, somewhere, sometime.

It's better if I do it now. And let me tell you why it's better. There are four or five or six or seven or eight of

these cases pending. And I've gotten the written discovery in this case. I haven't gotten it in other cases because I [15] decided basically that that was the most efficient way to do it.

THE COURT: Are those other cases also in front of Judge Cooper?

MR. YAGMAN: No. They're in front of a wide array of judges and magistrates.

And eventually, I'll get lucky. I'll get to depose them. It's better if I do it now because if I depose them now and I get my shot, then I've sealed the time capsule from November 1st, 1996 to date. And then I don't need to try to depose them again. I don't need to ask them these interrogatories again. I can just use pickup interrogatories and say, "Since the date of your deposition or your last interrogatories, has any of this happened?" I won't need to press them again.

I want to see their demeanor. I want to know if they have personal knowledge that they didn't vote or if they're saying that they didn't vote to do this because their attorneys told them or somebody else told them they didn't vote. I want to know if they've really probed their recollections. And I want to find out if they've used some tactic to get around this. And that is maybe they haven't voted, but they've delegated authority to somebody to do this on their behalf. I don't really know how it works.

You know, I pushed this issue initially through three [16] cases with the City of Los Angeles: Two cases called *Trevino versus Gates*, one case called *Cunningham versus Gates*. And then I got the *Navarra* (phonetic) decision

against the County. So that's the quartet of cases that I've used as vehicles to plow this issue; that is, are they indemnifying? And the first three cases against the City and I've deposed all the City Counsel members at one time or another on this issue. And then I didn't depose them again because I got what I needed. There were scores of indemnifications. But apparently, they're not doing it much anymore.

The good thing about this theory is it's actually an instance in which the law has changed the facts in the world because if what they say here is true; that is, that they haven't done any indemnification since November 1st, 1996, that means these cases and their fear of liability has probably changed something, because I have sworn testimony from a case in front of Judge Wilson in the early 1990's that they always indemnify deputy sheriffs from punitive damages.

I just want to clean up this issue and end it one way or another. In all those cases, Mr. Baum's firm defended the City. And now they – in all of the cases dealing with indemnification, they've been brought in as cocounsel to defend the Supervisors. My wild guess is that in all of these cases with the Supervisors, the County's paying out several hundreds of thousands of dollars to be represented just on this issue.

[17] I'd like to put the issue to rest and get to depose them. And then if they haven't ever done it, just leave them alone. That'll be the end of it. And this is part of the showing I'm making here. They can stop hiring that firm. They can stop fighting these things. A year – ever year or

so, I'll name them as defendants to find out if anything has happened. And if it hasn't, I'll let them go.

But they're going to continue to be named in every single case because they don't want to come out of the woods and/or the weeds or wherever they are and be deposed. Take probably a half hour to depose each one of them if there aren't a lot of objections.

The Court doesn't know it, but you can ask any attorney against whom I practice, I don't think I've ever taken a deposition that lasted more than an hour and a half, ever, of a police officer or anybody.

I just want to have a shot at them so I can convince myself that what they're saying in their interrogatory answers, in fact, is true and that there isn't any doubt about it in their minds.

THE COURT: Well, can I ask you a factual question?

I'm moving on to Baca in my mind. In Baca, have you gotten any written discovery? Have you conducted any written discovery and gotten responses?

MR. YAGMAN: Yes, we have. And I don't know off the [18] top of my head what it is. I think he answered some interrogatories. I believe that he said that the materials – or the information with respect to punitive damages was the same.

I'm not as concerned with deposing Mr. Baca as I am – I'm going to concede on that issue – as I am with the

Supervisors. And one of the reasons for that is that I believe his answers to be completely trustworthy. And one of the reasons is he's a personal friend of mine. And I like him. And I think he's doing a good job. And I don't think that there's any chance in the world that his interrogatory answers wouldn't be completely truthful. I just – I wouldn't believe it. So I'm not –

THE COURT: Was there anything in his answers that led you to believe that the Supervisors were falsifying their verifications?

MR. YAGMAN: Oh, no. No, no, no, no, of course not, of course not. I'm not saying they're falsifying. I'm not making a charge like that.

I'm just saying that I've been around for a while just like everybody else here has, and I've found that there are occasions where interrogatory answers, you know, appeared on their face to be completely true and accurate. And it turned out they really weren't. That there was something missing or there was some way, because I hadn't pressed the [19] right button or used exactly the right wording, that it turned out it wasn't so.

And I've got a duty to these Plaintiffs, especially because of their statuses, to really press this issue and get to the bottom of it. And I don't want to constantly depose them. I don't normally do it. I've never done it before. I don't want to harass them. I don't have any personal animus against them, as I do with some government officials.

And the other case – another case the Court cites, the ***Union Savings Bank versus Hauppauge (phonetic)***,

which is actually where I grew up on Long Island, case says, "An official's time and the exigencies of his everyday business would be severely impeded if every plaintiff . . . " Well, every plaintiff doesn't try to do it. No one tries to do it except me. I don't think anybody's ever tried to depose them. And I don't think anybody ever has. So it isn't every plaintiff, it isn't every case. Their duties aren't going to be severely impeded. They have plenty of time. I mean, when election time comes, they're out campaigning like crazy. And it's no big whoop at all for them.

And also, in that case, it says, as the Court's quoted:

> "Such procedure would be contrary to the public interest. Plus, the fact that ordinarily, the head of a Government agency has little or no knowledge of [20] the facts."

This isn't that case. They're the people with the actual knowledge of the facts because they're the people who either did or didn't do something. I'm not asking them anything about anything that anybody else did. It's, "What did you do? Did you really not pay any punitive damages at all for the last six years?" And the answer to that is, "If you didn't, that's great, that's fantastic."

That's exactly what I've been trying to accomplish since I first got on this issue in 1989 in the ***Cornwell*** case. And the Ninth Circuit ruled that it was not contrary to public law for the State of California to permits [sic] its governmental entities to make indemnifications for punitive damages.

That's where all this started. I said it was contrary to federal law because it would gut the deterrent purpose at Section 1983." And Judge Newton – Noonan writing for the Ninth Circuit in *Cornwell versus City of Riverside* said,

"That's a really good argument, but I think plaintiffs already have enough arrows in their quiver that they can use against defendants in civil rights cases," which was a glib way for a former law professor to say, "I ain't going to do that."

THE COURT: One of my former professors, Mr. Yagman.

MR. YAGMAN: And he's very glib. And he has written 14 books. And he's a –

THE COURT: Oh, I'm not suggesting I agree with him [21] on anything.

MR. YAGMAN: And he went to the Ninth Circuit because of his position on abortion. And he's a very bright guy. And I like him.

But when he said that in that case, in *Cornwell,* I then thought to myself, "This is really, really bad. How can this be attacked." And I started attacking it in 1990 in the first *Trevino* case. And I developed the theory that, "Okay. They can do it." But the Ninth Circuit never said – and now they've affirmed it in four opinions – that there won't be any consequences for doing that.

THE COURT: I want to point out to you that my ruling's without prejudice. I'm assuming you noticed that.

MR. YAGMAN: Sure I did. And I was –

THE COURT: It meant that –

MR. YAGMAN: And it puzzled me.

THE COURT: Well, it meant that you haven't met your burden – now. But if at some point down the line

you think you've met your burden and the circumstances change, then you come back to me.

MR. YAGMAN: Well –

THE COURT: That's why I did it without prejudice. You have not met your burden at this point.

MR. YAGMAN: Here's the problem. They've made a Motion for Summary Judgment –

[22] THE COURT: Yes, I know.

MR. YAGMAN: – that's pending now in front of Judge Cooper.

THE COURT: I saw that.

MR. YAGMAN: And in order to defend against that Motion, I need to be able to depose them. I think it's unheard of for Summary Judgment to be granted in a case where the plaintiffs haven't had an opportunity to depose the defendants.

But Judge Cooper will decide that. I defended against their last Summary Judgment Motion when they said, "You had discovery in another case" –

THE COURT: I know. I read her decision.

MR. YAGMAN: By putting in a Rule 56(f) Declaration, I'm just going to have to try harder in the next few days to find at least that one case where I know they did that. And then come back again.

I think I have met our burden. And I don't think the burden is that high, as the Court believes it is. But I certainly, you know, understand what the Court is saying and –

THE COURT: I don't think it's that high. I just don't think you've shown me anything.

MR. YAGMAN: Okay.

THE COURT: Okay.

MR. YAGMAN: Maybe we should address the issue of lead discovery counsel.

[23] THE COURT: First, I want to hear from Mr. Baum to see if he has any response.

Mr. Baum? You're the winner. That usually means you have nothing to say.

MR. BAUM: I'll submit.

THE COURT: All right. Now, I'm very fond of Joe Riechmann. I've said that publicly before. And I hope to see him again in this case at some point. But it doesn't mean that you have no right to appear today. But I'll take a look at my General Order in any event, and I'll correct it.

If it's – if it gives the impression that the Court is soliciting issues to decide on an advisory basis before the real issues, then that's my fault. And I'll look at it. And I'll consider whether or not the lead discovery attorney is the person who should come and make oral argument.

And I say that only because, as you know, in other contexts in this court, for example, in Settlement Conferences, the Court generally wants the lead – or the trial lawyer to come to the Settlement Conference and not someone else in the firm.

Your firm's in a little different position in that it's a small firm. And all the lawyers in it, I'm assuming, are

equal. And we're not dealing with a huge firm where the associate can't make decisions, and it's the partner who makes the decisions. And when the associate shows up, the court is [24] in a difficult position in that they're dealing with a person who has no authority.

I assume that you and Mr. Reichmann and everyone else in your firm have authority. And I'm not dealing with it any other way.

MR. YAGMAN: Let me address those two issues.

THE COURT: Uh-huh.

MR. YAGMAN: First, the Order doesn't create any ambiguity at all, except possibly because it's raised now with respect to depositions.

But all of us, I think, understood it to be the way that it –

THE COURT: You both understood that way. So it's clearly a drafting problem, and that's my fault.

MR. YAGMAN: Well –

THE COURT: And I'll take a look at it.

MR. YAGMAN: Well, it isn't really because we – if we all understood it the same way, there's no problem.

THE COURT: Yeah.

MR. YAGMAN: But that obviates –

THE COURT: Unless that's not the way the Court wanted you to understand it –

MR. YAGMAN: Okay.

THE COURT: in which case, there's a problem. And that's what I've got to look at. Okay?

[25] MR. YAGMAN: Okay. Second, as I said, I didn't submit to the Court the correspondence that's gone back and forth, between on the one hand, Joe Reichmann, and on the other hand, Defense counsel. But I'll summarize that in a nonpejorative way by saying that they keep insisting that one, Mr. Reichmann has to handle all discovery because he's lead discovery counsel; and two, that he was selected because there's something wrong with me. That's – they basically said that. And he's written – he's written –

THE COURT: I hope they're not suggesting that.

MR. YAGMAN: I'll submit the –

THE COURT: You –

MR. YAGMAN: – correspondence.

THE COURT: Well, you travel a lot more than Mr. Reichmann, for one thing. And so –

MR. YAGMAN: Nothing –

THE COURT: – he's generally been –

MR. YAGMAN: Nothing to do with it. No, no, no.

One of the reasons we did it is so that we wouldn't get into a big squabble over the fax thing.

THE COURT: Okay. And one of my provisions in the General Discovery Order is that the District Court's rules on civility and professionalism have to be applied by

all parties. And that's including in correspondence back and forth between the parties. And I expect that to be the case.

[26] MR. YAGMAN: I'm going to submit to the Court the correspondence between Defense counsel and Mr. Reichmann so the Court can actually see what's going on.

You see, if it had been between me and them – because I'm kind of considered to be a hard guy and Joe Reichmann is considered to be a really nice guy, we have different personalities. If that correspondence had gone back and forth between me and them, everybody would say, "Oh, it's Yagman. Yeah. He's being tough."

But wait until you see this stuff between gentle Joe Reichmann and these guys where they're threatening him with stuff. That if he doesn't do what they want, they're going to relentlessly pursue him personally for sanctions.

THE COURT: If any party in correspondence violates the District Court's guidelines on civility and professionalism, I think that the other party can bring it to the Court's attention in a Motion for Sanctions.

MR. YAGMAN: You can't because the Rules say that they're unenforceable in that fashion. And I'm not saying it in the sense of wanting to get sanctions. I'm way beyond that.

I'm saying it in the sense of trying to give the Court a sense of how the Defense has used this Order and our selection of Joe Reichmann. He wasn't selected because I'm out of town a lot. He was selected because we thought that things would go more smoothly. If he did that and they would –

[27] THE COURT: And I think they have gone smoothly in this case.

MR. YAGMAN: And they have except for this correspondence where they keep telling him that he must do all discovery that – he does – that we're reading the Order incorrectly, and that I shouldn't be doing anything.

And whenever I write to them, they respond to him. They deliver things to his home, even though he's told them not to. He said, "Deliver it to the office." And this has all been documented.

I don't want to make an issue of it, and I'm not trying to make an issue of it. What I'm trying to tell the Court is that to that extent, the Order has created a problem. And some clarification on that from the Court would stop this train from going any further down the track.

THE COURT: Which particular paragraphs in the Order do you think need modification?

MR. YAGMAN: Paragraph Number 1 and I think, Paragraph Number 6. I don't have it in front of me. They define what the lead discovery attorney will do. I don't get the sense that Order was drafted for this case. I may be wrong.

THE COURT: No. It's an order I've used mainly in multi-district litigation and class action litigation. It was used in this case because at the time I got this case, this may [28] have been a Class Action. And I thought it might go on to be a Class Action. And I generally treat Class Actions a little differently than other kinds of actions.

And if this Order needs modification to make it workable in this case, then I expect the parties to call that to my attention. In fact, I believe my last paragraph in this Order specifically said that if the parties or their counsel believe this Order needs modification or amendment, they should present it to the Court. And I did put a time line on that.

But if now that this is no longer a Class Action, and it doesn't appear to be –

MR. YAGMAN: We're fine with the way the Order is. We're just reading it differently, you see. And I think it's the first sentence of the first numbered paragraph that says that the lead discovery counsel shall and shall be available at all times for whatever.

The Defense is reading that differently than we're reading it. And they're reading it to indicate that Joe Reichmann has to do all the discovery. That I can't make any decisions with respect to discovery.

And we're reading it to mean that Joe's responsibility with respect to any of this is a supervisory one. It's kind of a reviewing one that if something that another attorney in the firm does with respect to the Defense is not liked by the Defense, they can get in touch with him and [29] say, "Hey. Would you have a look at this," which is fine with me. He's older than me. He has a right to do that.

But they're reading it to limit what anybody else can do. And that's what –

THE COURT: Okay.

MR. YAGMAN: That's what the problem is.

THE COURT: Okay.

MR. YAGMAN: And I am going to submit to the Court the various correspondence between him and them to show the Court what's really been going on here.

THE COURT: I really don't need to see the correspondence, Mr. Yagman, unless it's attached in some way to some kind of motion to me that I have to rule on. I'm sorry. I don't have time, generally, to read lawyers' correspondence to and from each other.

MR. YAGMAN: And that's why we haven't yet submitted that because Mr. Reichmann said, "Don't bother the Judge with that. Don't submit it."

THE COURT: Okay. Mr. Beach, I have not heard from you at all. Would you like to say something today?

MR. BEACH: With respect to the deposition of Baca in light of the Court's Tentative and the concession, I assume that that is denied.

THE COURT: Mr. Yagman conceded he's not pushing that deposition. It's the Supervisors' deposition that he's most [30] concerned about.

MR. BEACH: Okay. With that issue having been decided, I think it is fair to say that there is a difference of opinion between counsel for the Plaintiffs and counsel for the Defendants regarding –

THE COURT: The General Order.

MR. BEACH: – the role of the lead discovery counsel in discovery. I –

THE COURT: Do you have the General Order with you?

MR. BEACH: Yes, I do, your Honor.

THE COURT: It's Number 60 on the Docket Sheet. Mr. Yagman didn't bring his copy, but he pointed to Paragraph 1.

Are there any other paragraphs that the Court should look at again?

MR. YAGMAN: It's 6 or 7. I can't remember the other one.

MR. BEACH: Paragraph 6, Paragraph 7, and Paragraph 1 which starts off the issue of the lead discovery counsel.

MR. BAUM: In which –

MR. BEACH: And –

MR. BAUM: May I go on?

MR. BEACH: Yes.

MR. BAUM: And the last sentence is causing part of the problem as well, your Honor.

[31] THE COURT: All references herein to attorney or . . . Okay.

MR. BAUM: Yeah. There's a question as to whether or not in resolving a discovery dispute, we're required to work with Mr. Reichmann or Mr. Yagman. The Order just says, "Counsel shall correspond." Paragraph 1 says, "All references to attorney or counsel generally refer

to the lead discovery attorney." It requires that all correspondence be done by facsimile. Only the lead discovery attorney is required to disclose a facsimile number. Only Mr. Reichmann has.

THE COURT: Yeah, I know. It's because Mr. Yagman's firm, as I discussed earlier on the fax, is in a different situation than most of the firms.

MR. YAGMAN: But that's not a problem –

THE COURT: And this Order –

MR. YAGMAN: – because we don't object to them faxing things to Mr. Reichmann even if they're addressed to me. So it's not a problem. And it shouldn't be a problem.

THE COURT: Let me ask you something. I did notice – because I got a courtesy copy, and it may have been from one of you, so thank you – that a Motion for Summary Judgment had been filed. The Motion for Summary Judgment wasn't filed by all the Defendants, it was filed by the Board of Supervisors, not by Defendant Baca. So I'm assuming, regardless of whatever happens on that Motion, the litigation and the discovery [32] continues. And it certainly continues regarding Defendant Baca.

Is that your reading of the situation? Because the discovery cutoff date hasn't come yet. It's like the end of March or something, isn't it, Mr. Beach?

MR. BEACH: Yes, your Honor.

THE COURT: All right.

MR. BEACH: But I –

THE COURT: So –

MR. BEACH: I'm sorry.

THE COURT: Well, I was just trying to figure out the urgency in terms of correcting the General Order in light of ongoing discovery.

So there is ongoing discovery between Defendant Baca and the Plaintiffs, right?

MR. BEACH: Yes, your Honor. And I think it's fair to say – and Mr. Yagman can correct me if I am wrong – but I think it's fair to say that from the Defendants' standpoint, they view the issue as – with regard to discovery issues and discovery disputes and the working amount and the resolution of them, that the lead discovery counsel are supposed to be – that's our chore. My –

THE COURT: Well, I think it was set up that way –

MR. BEACH: My –

THE COURT: – because in multi-district litigation, [33] where you have 180 cases and you have 180 plaintiff's lawyers, you can't deal with 180 lawyers on one side and two lawyers on the other side equally.

MR. BEACH: And –

THE COURT: And that's why it was. And also, in Class Actions, it was set up the same way.

MR. BEACH: And my understanding – based on my conversations with Mr. Reichmann and the correspondence from Mr. Yagman, my understanding of Plaintiffs'

position is that if there's a dispute, first, we go try to resolve the issue with Mr. Yagman. And if we don't resolve it with Mr. Yagman, then we go resolve it with Mr. Reichmann.

And the problem with that is, besides the delay, it doubles the amount of effort we have to put in to try to resolve the issue. And unfortunately – well, actually, I think fortunately, I think we're able to resolve more issues with Mr. Reichmann on a faster basis.

And that's – when I got – when we sat here – when the Court issued the General Discovery Order and called us in here, we had a very long hearing. And I have picture memories of that hearing. And to me, the Court was – tried to impress upon me the very important and clear role that lead discovery counsel was going to take, et cetera, et cetera, et cetera, et cetera. And that's what we've been trying to proceed on –

THE COURT: Yes.

[34] MR. BEACH: – based on that spirit.

THE COURT: Usually, it's not different lawyers with the same firm.

MR. YAGMAN: The Court –

THE COURT: That's what I'm trying to explain.

MR. YAGMAN: The Court may not recall how this came about. I requested this so that the Plaintiffs wouldn't be burdened by dealing with more than one Defense attorney. And I suggested to the Court in a written submission that in the *Rampart* litigation that

Judge Feess had done the same thing. This wasn't requested by anybody but me.

And there isn't one lead Defense discovery –

THE COURT: Well, I –

MR. YAGMAN: – counsel.

THE COURT: – actually don't recall that. But in –

MR. YAGMAN: It's in the file.

THE COURT: – in usual circumstances, the problem is with lawyers from different firms. The problem is not with lawyers within the same firm and in figuring out how to expedite discovery that way.

I'll go back and I'll take a look at the General Order. The sole purpose of the Order was for the discovery process to move more smoothly. That's the sole purpose of it.

And for – because the judges set short time frames for discovery and if it's not moving smoothly, then people go [35] back to the judge to expand discovery and the whole case goes on and on and on, and it winds up costing more and more money and time for everybody.

So let me take a look at it. And my intention was for there to be a discovery attorney; for that discovery attorney to be available as much as possible so that there wouldn't be delays of time while the discovery attorney was in others [sic] parts of the country working on other litigation. And –

MR. YAGMAN: That is just so far from what I understood because that's not an issue in this case. I'm not in other parts of the country working on litigation. The

fact that I happen to live in New York means that I go there whenever I can. But I'm, you know, I'm available like that.

And you know, if a problem arises from this, we're just going to staunch [sic] the problem by making me lead discovery attorney. And that will be that. And they won't have a fax number. And then everybody can fight over that.

THE COURT: Hold on. They have Mr. Reichmann's fax number.

MR. YAGMAN: He – if he isn't lead discovery attorney, they're not going to be sending faxes to his home.

THE COURT: Well, we'll deal with that issue. I mean, I have to tell you, Mr. Yagman, that the Local Rules require that the lawyers provide their fax number on –

[36] MR. YAGMAN: If they have one.

THE COURT: Well.

MR. YAGMAN: If they can't and they don't, you know, and I'll fight this issue out in this court if I have to.

THE COURT: Well, at some point, you may have to.

MR. YAGMAN: They – Court – the Court can't require anybody to have a fax machine or have a line dedicated to a fax.

THE COURT: I –

MR. YAGMAN: If someone wants to litigate that, it'll go as high as it goes.

And one of the reasons – you know, we're civil rights lawyers. We're not a big firm like Mr. Baum's firm where there are unlimited resources. We make sure that everything we do is cost-effective because we pay for it. Our clients don't pay for anything. I know –

THE COURT: Well, I understand.

MR. YAGMAN: – the Court knows that.

THE COURT: But no one can say the fax is not cost-effective in that you get timelier things from the courts.

MR. YAGMAN: We get to decide –

THE COURT: You get timelier things –.

MR. YAGMAN: – if we dedicate a line to a fax machine, and not – nobody –

THE COURT: And –

[37] MR. YAGMAN: And it's there for our convenience, not for the court's, not for anybody else's convenience.

THE COURT: Well –

MR. YAGMAN: They have their resources. You know, when they want to send a messenger, they send one. When they don't, they send it by snail mail. I mean, there are a lot of games that go on in this.

THE COURT: No. Mr. –

MR. YAGMAN: We don't have a fax. We're not going to have one.

THE COURT: All right. I won't say anything.

MR. YAGMAN: I am –

THE COURT: You just talk right over me, Mr. Yagman.

I was going to point out to you in that –

MR. YAGMAN: I apologize.

THE COURT: – the recent emergency with the Postal Service in Washington, for example, has meant that this Court gets correspondence from Washington, not through the mail, but now by fax or e-mail.

I'm suggesting to you that it's not unforeseeable that at some point down the line, whether it's due to a national emergency or some other reason, that lawyers who litigate in the court may have to have faxes and may have to be able to get things by fax or e-mail from the Court.

I just want you to open your mind to that possibility [38] in light of 21st century developments.

MR. YAGMAN: It's presently voluntary. And –

THE COURT: That may be.

MR. YAGMAN: It is.

THE COURT: That may be. But I'm saying it may not be down the line.

MR. YAGMAN: And let me tell –

THE COURT: And I don't make policy for the Court.

MR. YAGMAN: Let me tell the Court one other thing also –

THE COURT: Uh-huh.

MR. YAGMAN: – so the Court doesn't get the wrong impression.

If a law firm receives things by fax, you also need to have someone always monitor the fax machine to make sure that something hasn't come. And I know for a fact, and I think the Court knows, that very frequently civil litigation is very uncivil whereas criminal litigation often is very civil.

And firms in Los Angeles, especially big litigation firms – and I'm not referring to Mr. Baum's firm – use the fax machine to harass people. And they use it as a bludgeon, and they send 50-page documents at 5 'till 5:00 on a Friday. And things like that. If we were to dedicate a line to the fax, we would also have to have a person regularly, every half hour, go and check the fax machine. We simply don't have those [39] resources. We just don't. And if we did, we might look at it differently.

But again, everything that we do in the several hundred cases we have, we pay for out of our own pockets. It's not funded by a client. And we have to watch what we do, like postage and faxes and personnel really, really carefully because there are times when cases come in and we get our contingency fee. And there are times when months and months and months go by and we don't make any money. I'm not whining about that. I'm simply pointing it out as a fact of life.

All law firms are not on an equal footing. And especially civil people who represent plaintiffs in civil rights cases, just don't have the resources when they always go

up against the Government to do it in the way that O'Melvany and Meyers does it. That's just a fact of life.

And as a result of what's come up with all this, I am hereby designating myself as lead discovery counsel in this case to put an end to all of this. We don't have a fax machine. Defense counsel are no longer authorized to fax things to Joe Reichmann's home because –

THE COURT: Let me point –

MR. YAGMAN: – that's where he lives.

THE COURT: Okay. But let me point something out to you. And I was trying to do this when I asked Mr. Beach whether the ongoing discovery is going to be with him. And so [40] it just seems to me, you're applying a standard that might be appropriate to Mr. Baum if he's the one who's been harassing, or he's the one who's been using pejorative terms in correspondence to Mr. Beach.

And it seemed to me, and I mean this, from my discussions with Mr. Beach and Mr. Reichmann, when they were meeting in my jury room initially and trying to figure out initial parameters, including getting information about the Plaintiffs in the most efficient and effective way for us to discover where these guys were and what their full names were and all these other things, which is essential for your case as well as their case, that Mr. Beach and Mr. Reichmann had worked out a cooperative working relationship.

And I want you to think and not act against Mr. Beach based upon your feelings towards Mr. Baum. And that's all I'm suggesting, Mr. Yagman.

MR. YAGMAN: The feelings with respect to both Defense counsel – and I'm not going to burden the Court with the correspondence because it includes Mr. Beach also.

THE COURT: Okay.

MR. YAGMAN: So I'm the lead discovery attorney; there is no fax number. And if somebody objects to that or thinks that this Court or anybody can require an attorney to dedicate a line to a fax, then they can raise that issue. And we'll fight it out with them.

[41] MR. BEACH: I have four points that I just want to raise, and they don't necessarily require a response.

The first is that the Court should know, and I'm sure you don't want proof of this. But I will represent to the Court that I receive faxes from Mr. Yagman's office virtually every day, at all hours of the day and night, whenever it suits them. So I think it's unfair for them to say, "We can't – we don't have to give you a fax number."

THE COURT: I –

MR. BEACH: But yet we can both –

THE COURT: I agree with you. I've made my views on the fax known.

And it may be –

MR. BEACH: That –

THE COURT: – that the Court Executive Committee, in determining the fact that it's put the fax number on the pleading pages, et cetera, may have to bite

the bullet and make a policy decision as to whether lawyers who litigate in this court have to have a fax.

And I'm not on that committee and probably will never be on that committee as long as I live. But it may be that it's appropriate to bring it up to that committee. And I'll think about that, Mr. Beach.

MR. BEACH: And in all, my point would simply be is, you know, if you're going to accept the benefits of a fax, then [42] you accept the burdens. That's my point.

The second issue that I have is that this Court's General Discovery Order provides that the role of lead discovery counsel cannot be switched. Once you've elect – made that election –

THE COURT: I'll have to look at that.

MR. BEACH: I will – you can – please do.

Third, if the Court is going to look at the General Discovery Order again, might I humbly suggest that you also look at the transcript where we sat down and discussed it because I think that would help put everything into context.

MR. YAGMAN: I'll add one thing to that. What I said, I said with the authority of Mr. Reichmann. He said that if this came up the way it came up, he doesn't want to be lead discovery counsel anymore because he's found it's become to [sic] burdensome for him. And if the Court needs to hear him say that, he'll be back from San Francisco this evening. We can reconvene again here tomorrow or Friday, and he'll tell the Court that. He doesn't want to have to deal with these guys anymore.

And he is annoyed that I participated in his selection as lead discovery counsel. So this isn't just me saying this, this is him also. And if you want to hear him say it, he's happy to come into court and say it on the record. So just tell us when, and he'll be here.

[43] THE COURT: Well, apparently, I was living in a fool's paradise when I thought that you, Mr. Beach, and Mr. Reichmann were getting along well together doing discovery in this case. And I must have just been in another world.

MR. BEACH: Well, my fourth point was, was just because there's been lots of accusations and statements and I haven't stood up and responded to them, I don't think that the Court should accept that as true.

I will tell you that I have worked with Mr. Reichmann. I've spoken with him on many occasions. He seems to be a very agreeable person. And we have – we have not resolved every issue, but we have resolved many issues. I think there are lots of issues in this case, and we have avoided discovery disputes by working them out. And I – it would be my hope that he continue to remain as discovery counsel for the benefit of everyone involved.

But you know, whatever this Court is – you know, permits the Plaintiffs to do is, you know, obviously beyond my control. But we have resolved many issues. We have not resolved all of the issues.

And when I first met your Honor and Mr. Reichmann, I believe your remark to me was something to the effect of, "Joe, I'm very glad you're here, and Mr. Beach, you will be, too." And I agree with you. Have – now, several months later, I concur in your observation.

[44] THE COURT: I'm very fond of Joe. I never see him, but I'm very fond of him. And I'm always happy to see him.

And I obviously had the false impression that – apart from this issue, which is a significant issue and an issue that really doesn't have anything to do with cooperation or amicability of the parties, but is a – is a legal question to be decided by the Court, that discovery was running smoothly. And I guess I completely misunderstood what was happening and I'm sorry.

MR. YAGMAN: Your Honor, it hasn't run smoothly. But we have refrained from making other motions because deadlines set for the Defense – we were supposed to do some things by November 29th. I rushed and got them all done by the 27th. And then that triggered the Defense doing other things and none of their responses to anything were timely. It's delayed the litigation.

We haven't complained to the Court about that because Joe Reichmann said, "Let it alone. Don't bother the Judge with it." I wanted to come into court with it a few times, and he held me back. And I said, "Fine. I'll take your advice. You're older than me. You've been around longer than me."

THE COURT: You keep saying he's older than you, but I – is that true?

MR. YAGMAN: Yeah. I'm 58, and he's 71.

THE COURT: I'm just teasing you, Mr. Yagman.

[45] MR. YAGMAN: Okay.

THE COURT: Okay.

MR. YAGMAN: Thank you.

THE COURT: Well, I feel older than Mr. Reichmann today. So give him my regards when you see him.

I think my task for today is reexamining my General Discovery Order. I have not heard anything today in oral argument that I didn't consider – actually didn't consider when I drafted the Tentative. I thought about all those things. And I've explained to you why I did it without prejudice.

MR. YAGMAN: Sure. Sure.

THE COURT: And –

MR. YAGMAN: I've got –

THE COURT: – the Tentative will go out as it exists.

MR. YAGMAN: Yeah. I've got a deposition –

MR. BEACH: Thank you.

MR. YAGMAN: – across the street at 10:00 o'clock.

THE COURT: Okay.

MR. YAGMAN: So I'm not –

THE COURT: You're excused.

MR. YAGMAN: – going to wear this out.

Thank you.

THE COURT: Everybody's excused.

[46] MR. BEACH: Thank you, your Honor.

MR. BAUM: Thank you, your Honor.

(This proceeding was adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Pattie Walker — FEB 05 2002
Transcriber — Date

TRANSCRIPT AUTHENTICATED BY:

TONI HUDSON

FEDERALLY-CERTIFIED TRANSCRIBER

/s/ Toni Hudson — FEB 05 2002

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED

SEP 13 2002

OFFICE OF THE CLERK

No. 02-236

In The

Supreme Court of the United States

YVONNE BURKE, *et al.*,

Petitioners,

vs.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RELEVANT PROCEDURAL HISTORY

On July 18, 2002, counsel of record for Petitioners executed a "Stipulation and Order for Dismissal with Prejudice of the Supervisor Defendants," a copy of which is set forth at App. 1. Respondent's counsel executed that Stipulation on July 10, 2002, the district court ordered dismissal with prejudice pursuant to the Stipulation on August 19, 2002, and the order was filed on August 20, 2002 and entered on August 21, 2002. *Ibid.* Therefore, this action is moot.

Apparently, Petitioners' counsel failed and has continued to fail to advise this Court of this important procedural fact.

INTRODUCTION

Standing is a threshold jurisdictional or quasi-jurisdictional doctrine that bars the doors of the federal courthouse, and the same article III imperatives that underlie the standing doctrines continue throughout the course of federal litigation under the rubric of the companion doctrine of "mootness," which may be thought of as standing redux. Mootness stops an action in its tracks either "when the issues presented no longer 'live' or the *parties lack a legally cognizable interest in the outcome.*" *Powell v. McCormack*, 395 U.S. 486, 489 (1969) (emphasis added). Here, Petitioners lack a legally cognizable interest in the outcome because they participated in a voluntary dismissal. The requirement that issues be raised in a sharp adversary context between *parties* with concrete stakes persists at each federal appellate level, here bars Petitioners seeking certiorari because they no longer are

parties to this action: there is no case or controversy as to Petitioners.

When a case becomes moot while it is on appeal, the ordinary appellate court response is vacatur of the judgment below. The principal reason for this is that the judgment loser should not suffer the adverse *res judicata* or collateral estoppel effects of that judgment, but only when, for reasons *beyond its control*, there is a denial of appellate review. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (referring to mooting that occurred "through happenstance"); *Associated Gen. Contractors of Conn., Inc. v. New Haven, Conn.*, 41 F.3d 62 (2d Cir. 1994). Here, the mootness is the result of Petitioners' voluntary entry into a stipulation for voluntary dismissal, and thus, not even vacatur would be appropriate.

Indeed, as here, when the parties render a case moot by settling their controversy, there are no equitable considerations that would favor a vacatur of the judgment sought to be reviewed, or even a vacatur to undo *res judicata* or collateral estoppel effects is not appropriate. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).

REASON FOR DENYING THE PETITION: MOOTNESS

There is no case or controversy, Petitioners, who agreed voluntarily to the dismissal of the action as against them are without standing to proceed, and therefore, the matter is moot.

For over 100 years, this Court has recognized that mootness bars its consideration of questions presented to it.

In *Mills v. Green*, 159 U.S. 651, 653 (1895), a motion was made to dismiss the appeal based on the ground that "there is now no actual controversy involving real and substantial rights between the parties to the record, and no subjectmatter [*sic*] upon which the judgment of this court can operate." (Internal quotation marks deleted.) Such is the case here, because there is no actual controversy involving real and substantial rights between the parties to the record, and hence no subject matter on which this Court can operate.

In *Mills*, this Court explained that

> the appeal must be dismissed upon this ground [of mootness], without considering any other question appearing on the record or discussed by counsel[,] [because t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when . . . an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.

Ibid. (citation omitted).

This Court "may not, without disregarding [its] duty, pass upon [questions presented] because of their absolute want of present actuality; that is, because of their now moot character." *United States of America v. Hamburg-Amerikanische Packetfahrtactien Gesellshaft*, 239 U.S. 466, 475 (1916).

In *Hamburg-Amerikanische*, this Court explained that it would refuse to decide a question "merely upon a prophecy as to future conditions invok[ing] the exercise of judicial power not to decide an existing controversy, . . . to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California v. San Pablo t.r. c/o*, 149 U.S. 308, 314, 37 L.ed. 747, 748, 13 Sup. Ct. Rep. 876[.]" *Ibid.* Here, Petitioners specifically attempt to invoke this Court's jurisdiction based not on an existing controversy, but instead on nothing more than a precatory attempt to "control[] predicted future conduct." Pet. at 6-7 & n. 1 (setting forth parade of horribles that may occur in future, and expressly seeking to "control[] predicted future conduct," as a basis for this Court to grant certiorari in and decide a moot matter).

In *San Pablo*, this Court held that "[t]he duty of this court . . . is limited to determining rights of persons . . . which are *actually controverted in the particular case before it*." *Loc. cit.* (emphasis added). Here, there are *no rights of persons which are actually controverted in this particular case*. Thus, this Court has a duty to deny the Petition.

Moreover, because this Court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or

rules of law which cannot affect the result as to the thing in issue in the case before it[,] [not even a] stipulation of the parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *Hamburg-Amerikanische*, 239 U.S. at 475-76. Here, Petitioners ask this Court to do that which the Court clearly has said it is without power to do, to wit, decide a moot question and "to declare for government [officials] of future cases principles or rules of law which cannot affect the result as to the thing in issue in the case before it." Here, as in *Hamburg-Amerikanische*, "there are no issues on the merits before [this Court] which [it] ha[s] a right to decide[,]" 239 U.S. at 477, because of the "general rule as to the absence of authority to consider a mere moot question," *ibid.*, and because of "the fact that the want of actuality ha[s] arisen . . . from the consent of the parties or the action of a defendant [here Petitioners]. . . . " *Ibid.* Petitioners themselves stanched and prevented "actuality" by seeking voluntary dismissal.

It is "[t]he established practice of the Court in dealing with a civil case from a court in the federal system *which has become moot while on its way here* . . . to reverse or vacate the judgment below and remand with a direction to dismiss[,]" *Munsingwear, Inc.*, 340 U.S. at 39, and "[t]his has become the standard disposition in federal civil cases. . . . " *Id.* at 39 n. 2 (collecting cases). Indeed, such is more so the case when a party "acquiesced in the dismissal," *id.* at 40, as here. As in *Munsingwear*, "[t]he case is therefore one where the [Petitioner], having slept on its rights, now asks [this Court] to do what by orderly procedure [they] could have done for [them]sel[ves]." *Id.* at 41. Petitioners participated in the voluntary dismissal of the

case below: if they wished to preserve the issues presented to this Court, they should not have done that.

Moreover, it has been suggested that this Court's duty of scrutiny in considering mootness *vel non* is lower when the Court has not granted certiorari, as opposed to when mootness has been asserted after the Court has granted review. *Mintzes v. Buchanon*, 471 U.S. 154, 105 S.Ct. 2006, 2007 (1985) (Burger, C.J., dissenting from memorandum) ("In my view, the Court has a higher duty when it learns that a case has become moot after it has granted review than when it discovers that a case in which review is being sought has become moot.") (Emphasis omitted.)

Should Petitioners rely in reply on either *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), or *Northeastern Florida Chapt. of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 661-62 (1993) (citing *City of Mesquite* for proposition set forth below), for a contention that the matter is not moot, the anticipatory response to such a contention is that both cases dealt with alleged mootness based on "a defendant's voluntary cessation of a challenged practice [which] does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289. Here, of course, there is no claim there was a voluntary cessation of any challenged practice, and therefore, *City of Mesquite* is inapposite.

Since "Courts of Appeal dismiss cases that have become moot between the time of the ruling below and the issuance of an appellate decision because of the requirement that article III courts decide only 'cases or controversies,'" *Armster v. United States Dist. Court for the Central*

Dist. of California, 806 F.2d 1347, 1354 (9th Cir. 1987), *as amended*, and because federal courts "do not have the constitutional authority to decide moot cases," *id.* at 1355, in this case the Petition for Certiorari should be denied because there presently is no case or controversy and hence no article III jurisdiction.

It follows from the foregoing principles that since no Petitioner in this case may be granted either absolute immunity or qualified immunity in *this* case, because all Petitioners consented to voluntary dismissal of *this* case as against them, and because this case therefore is not now pending against any of them, that there is no case or controversy. Petitioners are without standing to seek relief, and questions presented are moot. (That Petitioners seek prospective relief for themselves or others in other cases, as they admit, Pet. at 6-7 & n. 1, is no reason to grant the Petition, and is reason to deny it.)

CONCLUSION

Hardly is there any basis for this Court to grant certiorari based on an unpublished, summary affirmation, Pet. App. at 1, of an unpublished district court order denying a motion to dismiss, *id.* at App. 2-18, sought by persons who, by their own, voluntary act, no longer are parties to the underlying action, and who twice before sought, and were denied, certiorari of the same two questions by this Court: *Trevino v. Gates*, 23 F.3d 1480 (9th Cir.), *as amended, cert. denied sub nom. Wachs v. Trevino*, 512 U.S. 1281 (1994) (absolute immunity for voting to indemnify for punitive damages, question 1 herein); *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996), *cert. denied*,

117 S.Ct. 1249 (1997) (qualified immunity for voting to indemnify for punitive damages). Oddly, in none of Petitioners' citations to these two cases throughout the Petition does their counsel of record, Louis R. Miller, III, provide a complete citation to either case, including an indication of the denial of certiorari, or that certiorari was sought in those cases by the same Petitioners' counsel of record herein, Mr. Miller. Nor is it mentioned in the Petition that in *Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001), another case raising the same questions as those raised herein, cited at pages 6, 9, 15, and 18 of the Petition, certiorari could have been sought by Mr. Miller, who represented the same Petitioners herein, but the case was settled.

That instant attempted end run around the law should not be permitted because it went out of bounds when Mr. Miller entered into a voluntary dismissal of the action as against Petitioners on July 18, 2002.

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN YAGMAN

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Western Division

JAVIER ROCHA, Plaintiff, v. LEE BACA; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY; PETE SCHABARUM; DEANE DANA; MICHAEL ANTONOVICH; DAVID SAMEYAH; TWENTY UNKNOWN NAMED DEFENDANTS; all sued in their individual and official capacities; and COUNTY OF LOS ANGELES, sued only in its official capacity, Defendants.	Case No. 00-4989 AHM (BQRx) **STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE OF THE SUPERVISOR DEFENDANTS** [F.R.C.P. 41(a)(1)] (Filed Aug. 20, 2002)

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Javier Rocha ("Plaintiff") and Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich (the "Supervisor Defendants") by and through their respective counsel, hereby stipulate to the dismissal with prejudice of the above-captioned action as to the Supervisor Defendants, with each party bearing their own costs.

Dated: July 18, 2002

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: /s/ Andrew I. Baum
ANDREW I. BAUM
Attorneys for Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich

Dated: July 10, 2002

YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD

By: /s/ Stephen Yagman
STEPHEN YAGMAN
Attorney for Plaintiff Javier Rocha

IT IS SO ORDERED.

Dated: August 19, 2002

/s/ A. Howard Matz
The Honorable A. Howard Matz
United States District Court Judge